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No. 16 Original,
October Term 1904.

Supreme Court of the United States.

Office Supreme Court
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JAMES H. McKENNEY

IN THE MATTER

OF

THE PETITION OF GERTRUDE GLASER, AS ADMINISTRATRIX, FOR A WRIT OF MANDAMUS TO THE JUDGES OF THE UNITED STATES CIRCUIT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

Respondent.

RESPONDENT'S ANSWER.

CARL SCHURZ PETRASCH,
Attorney for Defendant in the Court below.

ALVIN CUSHING CASS,
Of Counsel for Respondent and for Defendant in the Court below.

EVENING POST JOB PRINTING OFFICE, NEW YORK.

Supreme Court of the United States.

IN THE MATTER

OF

The Petition of GERTRUDE GLASER, as Administratrix, praying for a writ of mandamus to the Judges of the United States Circuit Court for the Eastern District of New York.

The Honorable Edward B. Thomas, United States Judge, acting Judge of the Circuit Court of the United States for the Eastern District of New York, before whom all the proceedings referred to in the petition were had and by whom the decision therein was made, and who is now presiding as trial Justice in the United States Circuit Court for the Eastern District of New York, and upon whom the rule of this Court was served, answering the petition of Gertrude Glaser, that the Judges of such Circuit Court show cause why a writ of mandamus should not be granted commanding them to take jurisdiction and proceed against Anthony P. Langer in the suit now claimed by petitioner to be pending and undetermined in said Circuit Court, wherein Gertrude Glaser, as administratrix, the petitioner, is plaintiff, and said Anthony P. Langer, defendant, and to strike from the records of this Court the order made on the 14th day of November, 1904, and entitled "In the Matter of the Application of Gertrude Glaser, Administratrix, to Compel

the filing of an Answer or other relief, and to make such disposition of said suit as ought to have been made had said order not been made and entered therein, and why the petitioner should not have such other relief as might be just," respectfully submits his action in the premises and certifies that his reasons for denying the motion referred to in the petition are set forth in the order made thereon and which reads as follows:

At a Term of the United States Circuit Court for the Eastern District of New York, held at the Post Office Building, in the City of Brooklyn and County of Kings, on the 14th day of November, 1904.

Present—Hon. EDWARD B. THOMAS, *Justice*.

IN THE MATTER

OF

The Application of GERTRUDE GLASER, as Administratrix, &c., to compel the filing of an answer or other relief in an action alleged to be pending between Gertrude Glaser, as Administratrix, &c., of Isadore Glaser, deceased, plaintiff, and Anthony P. Langer, defendant.

A motion having been made herein for an order compelling the said Anthony P. Langer to file his answer in an alleged action against Gertrude Glaser, as administratrix, &c., of Isadore Glaser, deceased, plaintiff, and Anthony P. Langer, defendant, and for such other or further relief as might be proper, and said motion having duly come on to be heard; now on reading and filing the notice of

motion dated March 5, 1904, and the affidavit of Alfred H. Holbrook thereto attached, verified March 5, 1904, and the affidavit of Harvey C. Price, verified April 18, 1904, and the affidavit of Richard A. Irving, verified the 18th day of April, 1904, and the affidavit of Alfred H. Holbrook, verified the 18th day of April, 1904, and the affidavit of Lewis E. Carr, Jr., verified the 18th day of April, 1904, and the affidavit of Richard A. Irving, verified the 3d day of June, 1904, and the affidavit of Charles H. Blain, verified the 2d day of June, 1904, and the affidavit of Lewis E. Carr, Jr., verified the 29th day of June, 1904, and the affidavit of Richard A. Irving, verified the 29th day of June, 1904, and the affidavit of Olivia Moussetts, verified the 29th day of June, 1904, and the affidavit of Harvey C. Price, verified the 29th day of June, 1904, and the affidavit of Richard A. Irving, verified the 6th day of July, 1904, and the summons therein, dated September 29, 1902, and the complaint therein, verified the 22d day of April, 1902, and the notice of appearance of defendant, dated January 14, 1903, and the answer of defendant, duly verified by him on the 19th day of January, 1903, and the plaintiff's notice of trial, dated January 29, 1904, and the admission of defendant's attorney of service of same stamped thereon, and the affidavit of Gertrude Glaser, verified the 28th day of October, 1904, and of Richard A. Irving, verified the 29th day of October, 1904, duly permitted by this Court to be filed *nunc pro tunc*, in support of said motion; and the three affidavits of Alvin C. Cass, verified March 11, 1904, and April 4, 1904, and June 9, 1904, respectively, and the affidavit of Theodore P. Nanz, verified April 19, 1904, in opposition thereto, and after reading and filing the stipulations of counsel dated March 3, 1904, April 15, 1904, April 27, 1904, May 3, 1904, May 17, 1904, and two dated June 25, 1904, and undated stipulation extending time to April 15, 1904, and stipulation dated April 20, 1904, and the deposition of James G. Cochran, taken the 25th day of June, 1904, together with the letter of the Court, dated June 7, 1904, and after hearing

Alfred H. Holbrook, Esq., of counsel for plaintiff, in support of said motion, and Alvin C. Cass, Esq., of counsel for defendant, in opposition thereto;

Now, after due deliberation being had, it is

Ordered, that the said motion be and the same hereby is, in all things denied, upon the sole ground that no action of Gertrude Glaser, as administratrix of the goods, chattels and credits of Isador Glaser, deceased, plaintiff, against Anthony P. Langer, defendant, is nor ever has been pending in this Court.

Enter.

EDWARD B. THOMAS,
United States Circuit Judge.

That all of the affidavits and papers before him on the decision of that motion have been forwarded to the Clerk of the United States Supreme Court, for such use and consideration as the Honorable Judges of said Court may deem advisable.

And the said Judge of the United States Circuit Court for the Eastern District of New York, hereby appoints Alvin Cushing Cass counsel for the defendant Anthony P. Langer, to represent him and the Judges of the United States Circuit Court of the Eastern District of New York, and to present to the Honorable the Supreme Court of the United States such facts and considerations in connection with said petition as he may be advised.

Dated April 18, 1905.

Edward B. Thomas

Judge United States Circuit Court of
the Eastern District of New York.

Supreme Court of the United States.

Ex parte GERTRUDE GLASER, as Administratrix of the goods, chattels and credits of Isadore Glaser, deceased, Petitioner.	October Term, 1904. No. 16, original.

STATE OF NEW YORK, }
County of New York, } ss.:

ALVIN C. CASS, being duly sworn, deposes and says:

1. I am an attorney and counsellor at law and on behalf of the defendant, Anthony P. Langer, had personal charge of the defense of the alleged action brought in the Circuit Court of the United States for the Eastern District of New York, by Gertrude Glaser, as administratrix of the goods, chattels and credits of Isadore Glaser against said Anthony P. Glaser, which is the action the petitioner refers to in her petition.

2. As such I caused the notice of appearance and answer, referred to in the petition, to be served upon Lewis E. Carr, Jr., the attorney of record for the plaintiff therein, and I opposed the application made by and on behalf of said Gertrude Glaser to compel the filing of the defendant's answer.

3. The said Anthony P. Langer is, as deponent believes, the real party in interest in this proceeding other than the petitioner, Gertrude Glaser. The petition relates to an alleged action brought to recover damages for the negligent killing of the plaintiff's intestate through the negligence of Anthony P.

Langer, therein named as defendant. Such action was brought to recover money damages against said Anthony P. Langer, and for no other relief, under a statute of the State of New Jersey, permitting an action to be brought by or on behalf of the next of kin to recover damages sustained by them through the death of their intestate, through the negligence of some person or persons.

4. I have read the petition of Gertrude Glaser herein, and the same fails to state all the facts in the matters therein referred to, material to the interests of Anthony P. Langer, and the facts as stated in the petition seem to deponent in several particulars, to be ambiguous, or not strictly in accord with your deponent's recollection. The facts as involved in the proceedings referred to in the petition herein, are as follows:

On July 22, 1901, Isadore Glaser, the husband of the petitioner herein, met accidental death through the alleged negligence of the employees of Anthony P. Langer, which claim of negligence Anthony P. Langer does now and always has vigorously contested.

Nine days thereafter, and on August 1, 1901, letters of administration were issued to Gertrude Glaser, thereby qualifying her to bring action against the said Anthony P. Langer.

Nothing was done by said Gertrude Glaser, except the obtaining of ancillary letters of administration within the State of New York, until the 29th day of December, 1902, when what purported to be a summons was issued. The Statute of Limitations, within which an action to recover damages for death may be brought is two years in the States of New Jersey and New York. Gertrude Glaser had, therefore, out of a period of two years within which she might bring an action, waited more than a year and four months after she had qualified as administratrix before instituting suit.

5. On December 29, 1902, as shown by the petition herein, the petitioner's attorney prepared a summons and a copy thereof was served upon the defendant in that action, Anthony P. Langer, by an officer of the United States Circuit Court, *i. e.*, a United States Marshal.

The summons was not issued out of the United States Court; it was not signed by the Clerk, the seal of the Court was not attached, no application for the issuance of the summons as required by the practice in such Court was made, the complaint was not filed, no fee was paid for the issuance of the summons, or for the filing of the summons and complaint. The service upon Anthony P. Langer, however, was regular and proper, except that the summons was void by reason of the foregoing facts and none of those facts appeared in the copy of the summons served upon the said Langer.

Langer was a carpenter engaged in his business at the time referred to in the papers in the Village of Edgewater, State of New Jersey. He was not familiar with the signature of the Clerk of the Court, nor indeed with the forms or essentials of process issued out of said Court. He was informed at the time of service that such process server was a United States marshal, and he believed that the service was regular and proper, and the copy of the papers so served was taken by him to his attorney, and in a few days came into the possession of the associate of such attorney, your deponent, for action thereon.

Such copy of the summons purported to be a copy of a proper summons and was regular on its face.

6. Your deponent believed that the original summons was regular in all respects; he had no knowledge whatsoever of any irregularity or defect therein, and the original summons and complaint were not, at the time the notice of appearance and answer hereinafter referred to were served by deponent,

on file with the Clerk of the United State Circuit Court.

7. Solely in reliance upon the supposed validity of the summons served upon the defendant in that action, your deponent caused to be prepared and served upon the attorney for the petitioner herein, Gertrude Glaser, the plaintiff in that action, a notice of appearance and verified answer. A correct copy of that notice of appearance is printed in the petition.

The petition, at page 6, refers to a claim made by petitioner in the Circuit Court that counsel for the defendant (referring to deponent) must have known of the defect in the summons *before* serving said answer.

Your deponent specifically denies that he had any such knowledge or any information which might put him on guard as to any defect in the original summons until after the service of the answer.

In an affidavit verified by your deponent in June, 1904, and now with the rest of the papers in this matter in the office of the Clerk of the United States Circuit Court for the Eastern District of New York, your deponent swore as follows:

> "The notice of appearance and answer were served under my instructions, and at the time of such service and thereafter, and until I attempted to file the notice of appearance and answer together, I was in entire ignorance of the fact of the impropriety in the summons. Those papers would not have been served had I not been misled by the service upon the defendant."

8. Your deponent further says that upon the service of such answer upon the attorney for the plaintiff in tnat action, he went to the office of the Clerk of the United States Circuit Court for the Eastern District of New York with such notice of appearance and answer, for the purpose of filing them as required by the rules of that Court.

That upon presenting the notice of appearance and answer to the Clerk, he was informed by him that no summons in such an action had been issued by the Clerk. That no index had been made in the records of that Court, of any such action, but that deponent could leave the notice of appearance and answer if he desired.

The Clerk further advised your deponent that the signature on the original summons purporting to be the signature of the Clerk, was not, in fact, the signature of the Clerk, nor had such summons been signed or issued through him.

Your deponent thereupon asked the Clerk what the effect would be of your deponent's failing or refusing to file the notice of appearance and answer, and he was informed that there being no action properly commenced, it would be necessary for the plaintiff to re-serve the defendant with original process.

Your deponent thereupon advised the Clerk that he did not want to file such notice of appearance and answer and did not want in any way to waive the impropriety in the summons, and he declined to file such notice of appearance and answer and has from that day to this, so refused and declined, and contested the attempt on the part of said Gertrude Glaser, petitioner herein, to compel their filing.

9. Your deponent contests the correctness of the law as given in the petition herein, that the notice of appearance and answer so served through him on behalf of Anthony P. Langer constituted an appearance in the action.

Your deponent contests that such service was a voluntary appearance under the decisions of the United States courts or the decisions of the courts of the State of New York, and your deponent claims and has claimed that such appearance could only be effective by the *filing* of such notice of appearance and answer or one of them.

10. Your deponent urges that the service of the notice of appearance and answer having been made under a mistake of fact, and having been induced by the wrong of the petitioner, *i. e.*, the forgery (unintentional as it may have been) of the signature of the Clerk, such service is not under any authority, a *voluntary* appearance.

11. Deponent further claims that there was no necessity for an application by him to withdraw the notice of appearance and answer served upon the petitioner's attorney, for the reason that such appearance (though induced by mistake) had not been completed.

Deponent cites as authority for this proposition the efforts made by petitioner to compel the filing of the notice of appearance or answer, because the filing of one was necessary to give the Court jurisdiction to proceed with the plaintiff's claim for judgment. Your deponent further urges that the provisions of the New York Code of Civil Procedure relative to the service of notice of appearance or answer are inapplicable, as the State court practice does not require the filing of pleadings to render service effective, and the practice governing the Circuit Court of the Eastern District is shown by the affidavit of the Clerk of the Court hereto annexed.

The notice of appearance was served three days before the answer simply because deponent endeavored to obtain an extension of time to answer. On failure to obtain the extension the answer was prepared and served.

12. The answer was served on January 19, 1903. Plaintiff made no attempt to prosecute the action until January 29, 1904, more than a year later and until over two years and five months had elapsed since plaintiff qualified as administratrix. Then a notice of trial was served. This could be returned *only* because of a defect in the service or some irreg-

ularity in the notice, and neither was present. There was no authority for returning it on the ground that the summons was defective.

13. In March, 1904, the petitioner served a notice of motion to compel the filing of defendant's answer, and it is the order denying that motion which petitioner seeks on this application to review.

On behalf of the defendant your deponent opposed that application on the following grounds:

(*a.*) The summons served was a nullity.

(*b.*) The service of the notice of appearance and answer was caused by the wrong or mistake of the plaintiff, and was not therefore a voluntary appearance.

(*c.*) That no appearance had been made in the action, as neither the notice of appearance or answer had been filed as required, and that therefore no motion for leave to withdraw his appearance was necessary on the part of the defendant.

(*d.*) That the plaintiff's remedy was wrong. If an appearance had been made, then plaintiff should have asked for judgment on default.

(*e.*) The plaintiff was guilty of gross laches.

14. Your deponent desires to dispute the contention raised by the petitioner that the mistake in the summons was due solely because a clerk in the employ of petitioner's attorney "thought this" (the writing in of the clerk's name himself) "the proper procedure (*confusing the practice of the Federal and State courts*)" (pp. 3 to 4 of the Petition).

The name of the Clerk of the Court does not appear on the summons of any court of record of the State courts of the State of New York, neither Supreme Court, City Court of the City of New York, County Court or otherwise.

The name of the Clerk of the Court, however, appears on the summons issued in the Municipal Court of the City of New York, of which there are twenty-three in said City. In those courts the summons is issued by the Clerk, is signed by him and the filling in of the Clerk's name would constitute in such Municipal Court the same grave error as was committed in this case. Therefore, the clerk could not have confused the State court and the United States court's practice. Had he been thinking of the practice of the State courts, he could not have made the mistake he did.

15. That petitioner's attorney knew or should have known of the defect in the summons appears from the following facts:

(*a.*) No application for the summons was made as required by the Circuit Court for the Eastern District of New York.

(*b.*) The form of summons issued by the Clerk of the Circuit Court for the Eastern District of New York requires the filing of the defendant's answer.

(*c.*) His office was advised by the deputy clerk immediately upon the marshal's return of the summons that it was irregular, as more fully appears below.

(*d.*) Plaintiff's counsel, Richard A. Irving, expecting a default in the service of defendant's answer, and taking precautions to reap advantage from that anticipated default, was watching to see if the answer was served and filed in time, as more fully appears below.

(*e.*) No fee was paid by plaintiff for the filing either of the summons or complaint or for the issuance of the summons.

16. The facts referred to in paragraph 15, subdivision (*c*), regarding the information given by the Deputy Clerk to the office of plaintiff's attorney are as follows:

The Deputy Clerk of the Court, Joseph G. Cochran, by deposition now in the Clerk's office, with the papers in this matter, testified as follows:

> "Q. State whether you noticed anything
> "unusual about those papers, and, if so, what?
> "A. I took the papers in hand to enter them
> "up in the register, and was unable to find
> "in the register any record of such a case. I
> "then looked at the summons and complaint
> "more carefully and discovered that the sum-
> "mons was not signed by Mr. Benedict, the
> "Clerk, nor did it bear any seal of the Court.
> "Q. Was it or was it not a usual thing to find
> "such a void summons in this Court? A. It
> "is very unusual. It has occurred possible
> "two or three times since I have been here.
> "This fact is one that helps me to remember.
> "The facts of the case are very clear in my
> "mind. Q. State what you did when
> "you discovered this? A. I did what is
> "customary for me to do in these cases; I
> "communicated with the attorney's office
> "whose name appears on the papers, Lewis
> "E. Carr, Jr. In this case my recollection is
> "that I communicated by telephone explain-
> "ing to the person who answered the 'phone
> "that this summons and complaint was in my
> "possession, and that I had been unable to
> "find a record of such a case in this Court,
> "and asked him to look up the matter and let
> "me know what he found."

He further testified that the summons and complaint had never been filed in his office.

This deposition was taken at the suggestion of Mr. Justice Thomas, made in a letter to the attorneys for both parties, dated June 7, 1904, as follows:

> "DEAR SIR:
> Mr. Holbrook (one of the attorneys for the plaintiff, and a partner of Richard A. Irving)

in his affidavit on the motion in the above action, states as follows:

"That on the day of February, "1904, deponent went to the office of the "Clerk of this Court to file his note of issue "and was then informed for the first time "of the alleged defect in the service of the "summons and complaint herein. That "deponent was then handed by said Clerk "the original summons and complaint with "the Marshal's certificate, the same being "submitted herewith as part of the motion "papers. That said Clerk stated that this "had been on file in his office since about "the 30th day of December, 1902, &c."

Mr. Irving and Mr. Carr likewise disclaim knowledge of the illegal service. The summons and complaint bear no evidence of having been filed, and the Deputy Clerk states that they were not filed, and he also states that he recollects advising the plaintiff's attorneys' office by telephone of the condition of the matter at the time the Marshal returned the summons and complaint. It seems proper that the evidence of the facts, whatever they may be, should be taken and made a part of the motion papers,

Yours truly,
EDWARD B. THOMAS,
U. S. J."

Deponent feels it only fair to the petitioner's attorney to state that subsequent to this deposition of the Clerk, the attorneys for the petitioner produced *ex parte* affidavits by themselves, their clerk and their telephone operator denying positively that any such message had ever been received.

17. The facts referred to in paragraph 15, subdivision (*d*), regarding the attention of plaintiff's attorney Irving having his attention directed at the time to the service and filing of the answer, are as follows:

On the argument of the motion made by him to compel the filing of the defendant's answer, said at-

torney urged that the defendant's answer was not served in time to enable the defendant thereafter to file it in the office of the Clerk before it closed for the day. The summons was served on December 30, 1902, and January 19th was the last day for appearance and answer. In an affidavit made by said Irving, verified April 18, 1904, and now with the rest of the papers in this matter in the office of the Circuit Court Clerk, he swore as follows:

> " That late in the afternoon of the last day " and not earlier than half past four o'clock " P. M. said Cass (meaning your deponent) " spoke to deponent on the common tele- " phone of said Carr and deponent, and " stated that he wanted an extension to an- " swer in this suit; that he had vainly en- " deavored to see said Carr and had made " numerous trips to his office to find him, and " asked if deponent as an associate of said " Carr could not give to the attorney for the " defendant an extension of time within " which to serve his answer; that he would " be unable to get his answer served that day " and that he wanted deponent to give him " only sufficient time to see said Carr on the " next day, if deponent would do no more. " * * * That deponent expected that said " defendant would be in default for the reason " that *it was then too late to procure an ex-* " *tension from the Court*, and deponent knew " that defendant who lived in the part of " Brooklyn known as Williamsburg, was " often away and inaccessible and lived at a " distance from his attorney's office. That " deponent waited at his office until six thirty " o'clock, and until the last delivery of mail " on that day, and watched for any papers or " mail delivered for said Carr, but that no " no answer was served at the office of said " Carr by the defendant until after deponent " left the office on that day. * * * *That* " *the Clerk's office of this Court closes daily* " *at 5* P. M."

18. Your deponent contests the correctness of the contention made by the petitioner that Anthony P.

Langer entitled the plaintiff to the relief sought, by opposing her application, and your deponent contends that the proposition of law sought to be enforced by the petitioner that the only way said Langer could avoid waiving the defect in the summons was to allow the motion to compel him to file his answer to be granted by default, is unsound.

19. This affidavit and return is verified by your deponent, and not by Anthony P. Langer, for the reason that each and all of the facts herein stated refer to transactions had by your deponent without participation by the said Langer, and that no facts stated herein are within the knowledge of said Langer, other than the service of the summons and complaint upon him, which facts are conceded as alleged in the petition. That it has been impossible to print all of the papers submitted to the Circuit Court Justice on the motion of the petitioner, within the time limited.

20. The granting of the application would be a great hardship to the defendant Langer. The witnesses to the accident were workingmen, and they have dispersed or disappeared, and the defendant will be practically unable to defend an accident case over four years and a half after the occurrence of the accident.

Sworn to before me
April 15, 1905. } Alex. Klein

Conrad Kremp.
Notary Public, No 75
L.S. Nyc.

SUPREME COURT OF THE UNITED STATES.

Ex parte GERTRUDE GLASER, as Administratrix, &c., Petitioner.	October Term, 1904. No. 16, original.

STATE OF NEW YORK, County of Kings, } ss.:

B. L. BENEDICT, being duly sworn, says:

I.—I am the Clerk of the Circuit Court of the United States, and have been since 1874.

II.—The rules and practice of this Court require and have, ever since I have been Clerk, required that the complaint and answer or other appearance in a common law action should be filed in the office of the Clerk of the Court, and such rules and practice have been strictly complied with to my knowledge for the past thirty years.

III.—Among the printed and published rules of the Circuit Court of the United States for the Eastern District of New York are the following:

> Rule 5. "All process must be signed and "sealed by the Clerk" * * *
>
> Rule 8. "Upon the service of such moni- "tion or summons, the defendant may en- "dorse his appearance thereon, or, if he re- "fuse so to do, the marshal or officer serving "the same may leave a copy thereof with "him, and thereupon return the same per- "sonally served; and in either case the clerk, "upon filing such process, shall enter the "defendant's appearance in the action, "* * * and thereupon, upon filing the

"declaration, or, if the same has been already
"filed, an order may be entered requiring
"the defendant to plead thereto within
"twenty days or that his default be entered."

Rule 35. "In order to amend, a copy of the
"amended pleading shall be filed, and an
"order to amend entered by the clerk, and
"the notice to plead or answer shall be from
"the day of the service of a copy of the plead-
"ing as amended and on file."

Rule 66. "Judgments by default may be
"entered immediately after such default is
"entered, in vacation as well as in term."

IV.—The printed form of application for the issuance of a summons issued by the Circuit Court reads as follows:

"Please to enter appearance
"as attorney for the plaintiff in
"the above entitled cause, and issue sum-
"mons to the Marshal for service upon the
"defendant above named.

".....,
"Attorney for Plaintiff.

"Dated , 190 .

"To the Clerk of the Circuit Court of the
"United States for the Eastern District
"of New York."

V.—The printed form of summons issued by the Circuit Court reads as follows:

" UNITED STATES CIRCUIT COURT

" FOR THE EASTERN DISTRICT OF NEW YORK.

" AGAINST

" TO THE ABOVE NAMED DEFENDANT:

" You are hereby summoned to answer the " complaint in this action, and to file your " answer and serve a copy thereof on the " plaintiff attorney within twenty days " * * * ."

VI.—No process has ever been issued by the Circuit Court on behalf of Gertrude Glaser and no pleading or other paper in any such suit has ever been marked filed in the office of the Clerk.

Sworn to before me
April 15, 1905.

B. Lincoln Benedict

Percy P. B. Gilkes

L.S. Notary Public Kings Co. N.Y.